# Petition

81-296

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

No. _____

IN RE VERNON RICH, etc.

PETITION FOR WRIT OF CERTIORARI
TO THE THREE JUDGE DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Norman B. Smith
Martha E. Johnston
Smith, Patterson,
Follin, Curtis,
James & Harkavy
704 Southeastern Bldg.
Greensboro, N.C. 27401
Telephone: 919-274-2992

Counsel for Petitioner

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Counsel for Petitioner

The petitioner prays that a writ of certiorari be issued to review a judgment and order, entered on May 15, 1981, by the Three Judge District Court for the Western District of North Carolina, holding that Subchapter 2D of Title V of the North Carolina Administrative Code is not unconstitutional as being violative of petitioner's First and Fourteenth Amendment rights.

## QUESTION PRESENTED

Whether the District Court's extension of this Court's holding in Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) to uphold the "publisher-only" rule in effect in the North Carolina state prison system, a rule which prevents prisoners from receiving books, magazines and newspapers not sent directly from the publisher, authorizes an unconstitutional restraint on the First Amendment rights of prisoners and conflicts with prior decisions of this Court.

## PARTIES TO THE PROCEEDING BELOW

Petitioner Vernon Rich, on behalf of himself and all others similarly situated, was plaintiff below. Defendants in the proceeding below were D. G. Luther, Superintendent of the Union County Unit of the North Carolina Division of Prisons; David Jones, Secretary of the North Carolina Department of Correction; Ralph Edwards, Director of the Division of Prisons of the North Carolina Department of Correction.

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## OPINION BELOW

The opinion of the Three-Judge District Court for the Western District of North Carolina is reported at 514 F.Supp. 481 (W.D. N.C. 1981) and is reproduced in the Appendix.

## JURISDICTION

The date of the opinion and order of the Three-Judge Court sought to be reviewed is May 15, 1981. This petition is being filed within 90 days of that date.

The jurisdiction of this Court is invoked under §1651(a) of Title 28, United States Code.

Section 1253 of Title 28 United States Code confers upon this Court exclusive appellate jurisdiction of suits which are required to be heard before a Three-Judge District Court. The appellate jurisdiction of this Court is now foreclosed to petitioner, and grant of the common law writ of certiorari, as authorized by 28 U.S.C. §1651(a), is sought in aid of such exclusive appellate jurisdiction.

The special and unusual circumstances which warrant exercise by this Court of its discretionary power to issue the common law writ of certiorari, as requested in this petition, are set forth below under the heading "Reasons for Granting the Writ."

## CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment, United States Constitution:

> Congress shall make no law. . . abridging the freedom of speech, or of the press. . . .

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

North Carolina Administrative Code, Title 5, Subchapter 2D.0101(a):

> An inmate in medium, close, or maximum security may receive a reasonable number of books, newspapers, magazines, and other publications directly from the publisher. An inmate in minimum custody may receive publications from any source subject to the standard search for contraband. Inmates ordering publications

must forward their payment for subscriptions or individual publications with their orders; inmates shall not receive publications of any kind on a trial basis with payment postponed. Additional publications may be donated to the unit or institution by community organizations or other interested persons in the community. The number of publications received by individual inmates, however, may be reasonably limited, to prevent overcrowding and possible fire hazards. All material submitted for delivery is subject to a search for contraband.

## STATEMENT OF THE CASE

The petitioner, Vernon Rich, is an inmate in the North Carolina prison system, and has been such at all material times relevant to this litigation. On August 29, 1975, when petitioner was a resident of the Union County Prison in Monroe, North Carolina, an acquaintance mailed him two paperback books: GREAT SHORT WORKS OF MARK TWAIN and THE TEACHINGS OF DON JUAN: A YACQUI WAY OF KNOWLEDGE, by Carlos Castaneda. Acting pursuant to 5 N.C.A.C. 2D.0101(a) (See p. 5, supra), prison officials returned the books to their sender with a card stating, "Books must come directly from publisher." Petitioner instituted this action on December 4, 1975, on behalf of himself and all other inmates of North Carolina prisons, seeking an injunction against the operation of this "publisher-

only" rule on the ground that the rule unreasonably restricted the First Amendment right of prisoners to read the materials of their choice. Jurisdiction of the federal district court was invoked under 28 U.S.C. §§1343 and 2201, and 42 U.S.C. §1983.

On March 11, 1976, the District Court for the Western District of North Carolina requested the Chief Judge of the Fourth Judicial Circuit of the United States, pursuant to 28 U.S.C. §§2281 and 2284, to designate a three-judge court to hear and determine the action. On March 15, 1976, Chief Judge Haynsworth issued an order designating the Hon. J. Braxton Craven, Jr., United States Circuit Judge, and the Hon. Woodrow W. Jones, United States District Judge, to serve with the Hon. James B. McMillan United States District Judge, in the hearing and determination of this action.

Thereafter, the parties engaged in discovery pursuant to a complex case order entered by Judge McMillan on May 4, 1976, under which they were to arrive at stipulations of disputed and undisputed facts. Preparation of the case for hearing was delayed by the death of Judge Craven on May 3, 1977, necessitating the appointment of a new three-judge court, and by the District Court's decision to defer any ruling in this case pending this Court's decision in Bell v. Wolfish,

441 U.S. 520 (1979). After this Court's decision in Wolfish was handed down, the District Court ruled that this case was distinguishable from Wolfish at least to the extent necessary to warrant its continuance before the three-judge court.

Accordingly, Chief Judge Haynsworth again designated a three-judge court, composed of Judge Donald Russell of the Fourth Circuit Court of Appeals, Judge McMillan and Judge Jones. A hearing was held before this Court on September 30, 1980. Evidence was presented in the form of stipulations, and of affidavits and depositions of expert witnesses for both sides. The parties stipulated that the control of contraband, including weapons, controlled substances, and money, is critical to the maintenance of order and security in prisons. They also agreed that contraband could possibly be concealed in publications; petitioner's evidence tended to show, however, that publications are a minor, and easily detected, source of contraband. Petitioner's witnesses testified that metal detecting devices can search large numbers of books quickly for metal, and that a routine search of a book or magazine can be conducted in less than thirty seconds. (Affidavit of Hans W. Mattick at 3-6; Deposition of Dr. Robert Sarver at 19-23, 60).

Respondents' witnesses supported the publisher-only rule on the ground that allowing books to be sent into prisons from non-publishers would increase security risks by increasing the flow of weapons and contraband. However, two of respondents' witnesses, with a total of 57 years of experience as prison administrators, were able to cite only one incident when a book was used in an attempt to smuggle drugs into a prison. (Deposition of Henry J. Cox at 14; deposition of H. G. Moeller). The single witness who had worked at an institution that operated without a publisher-only rule testified that when the publisher-only rule was repealed at the Cummins Institute in Arkansas, the increase in incoming mail was negligable, and there was no effect on security. (Sarver deposition at 17-18). All witnesses agreed that the presence of contraband is a severe problem in all prisons, including those in which a publisher-only rule is in effect. Petitioner's evidence tended to show that the main sources of contraband discovered in penal institutions, in descending order of frequency and importance, are: (1) the institution itself with its kitchens, supply rooms, maintenance equipment, and work and educational facilities; (2) a minority of naive, opportunistic or corrupt employees, tradesmen and deliverymen who have access to the institution; (3) the ordinary influx of

inmates in the processes of admission and discharge, and/or inmates who pass in and out of the institution as trustees, on work details, and on their way to and from court; (4) visitors; and (5) letter and package mail that is inadequately inspected.

Petitioner's evidence also established, without contradiction, that publishers offer for sale only books that are currently in print, and only at list price. Many retail outlets as well as book clubs offer books currently in print for sale at substantial discounts. Used books are not available at all from publishers, but may be purchased from used book dealers, at a fraction of list price. Through the statewide interlibrary loan service in North Carolina, persons may borrow from the library of their choice any book listed in the University of North Carolina Union Catalog. It is possible to borrow such books by mail. Moreover, most prisoners are either paupers or of extremely limited financial means and cannot afford to pay publishers' list price if they wish to obtain books. (Stipulations of the Parties at 4-6).

Following the hearing before the Three-Judge Court, a majority of the court rendered an opinion and order upholding the constitutionality of the North Carolina publisher-only rule.

Judge McMillan dissented, and wrote an opinion expressing the view that the rule violates the First Amendment rights of prisoners.

## REASONS FOR GRANTING THE WRIT

1. The decision below represents an unwarranted extension of Bell v. Wolfish which abridges the First Amendment rights of prison inmates and conflicts with prior decisions of this Court.

In Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), this Court held that a prohibition against receipt of hardback books unless mailed directly from publishers, book clubs or book stores did not violate the First Amendment rights of the short-term inmates at the Metropolitan Correctional Center in New York City. The rule in effect in that case applied to a prison housing primarily pre-trial detainees, whose stay was limited to a maximum of 60 days at the MCC, and the majority of whom spent 10 days or less there. Convicted prisoners at the MCC were generally awaiting sentencing or serving relatively short sentences. 441 U.S. 524 and n. 3.

The publisher-only rule in the North Carolina prison system differs in its operation and effect from the MCC rule

in several important respects which were disregarded by the majority of the court below. This publisher-only rule prohibits receipt of all paperback books, magazines and newspapers, as well as hardback books, not sent directly from a publisher. Receipt of books from book clubs and book stores is also banned under the North Carolina rule, though no evidence was offered to the effect that employees of such enterprises are any less trustworthy than employees of publishers. The North Carolina rule is in effect in all medium, close, and maximum security units in the state, thus operating to deprive many long-term inmates of the reading material of their choice for the rest of their lives.

Furthermore, the record in Wolfish revealed that the MCC offered a large library of over 8,000 books for use by inmates and offered for sale four daily newspapers and certain magazines. 441 U.S. 552 n. 33. While the defendants below introduced an affidavit showing a list of titles available at one prison library in North Carolina, it offers little in mitigation of the effect of the publisher-only rule. The titles include sixty books by Louis L'Amour (e.g., Showdown at Yellow Butte), thirty-five books by Don Pendleton (e.g., Chicago Wipe-Out, Colorado Kill-Zone). The list does not include either of the books that petitioner's friend sought

to send him through the mail.

In addition to the evidence that North Carolina prisoners suffer far greater deprivation from the operation of the publisher-only rule than did the detainees in Wolfish, there is considerable evidence in the record to support a finding that the North Carolina rule is a needlessly heavy-handed approach to a perceived problem. For example, petitioner offered in evidence the deposition of Dr. Robert Sarver and the affidavit of Hans W. Mattick; both these men are nationally recognized authorities in the area of correctional administration. Their testimony establishes that publications are a very minor source of contraband in prisons, that contraband continues to be a problem in prisons where a publisher-only rule is enforced, and that there was no significant increase in incoming mail following the abolition of a publisher-only rule in one institution, and no increased security problems. Any danger that contraband might be introduced in books could be abated, these witnesses agreed, by a simple but complete thirty-second search of each incoming volume.

This Court in Wolfish deferred to the judgment of the MCC prison administrators by necessity, because there was

simply no evidence in the

> record to indicate that MCC officials have exaggerated their response to this security problem and to the administrative difficulties posed by the necessity of carefully inspecting each book mailed from unidentified sources. Therefore, the considered judgment of these experts must control in the absence of prohibitions far more sweeping than those involved here.
>
> 441 U.S. 520, 551, 99 S.Ct. 1861, 60 L.Ed.2d 447, 476 (1979).

The record evidence in this case, unlike that in Wolfish, establishes that North Carolina's publisher-only rule is a gross overreaction to the problem of institutional security. Moreover, this record establishes that the rule operates to deprive inmates of access to many books that cannot be obtained from publishers, even by the very few inmates who would be able to pay list price for such books. The effect of this rule is thus to prevent inmates from reading the books of their choice over long periods of time, for a purpose that could be as easily accomplished by far less restrictive measures.

When viewed in the context of the record evidence submitted in this case and only briefly summarized herein, the ruling of the court below upholding this rule conflicts with prior decisions of this Court that established the parameters of the First Amendment rights of prisoners and were unaffected by Bell v. Wolfish. In Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), this Court held that some limitations on First Amendment rights are justified if certain criteria are met. "First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of free expression." Id. at 413. The Court earlier identified the governmental interests at stake in the maintenance of penal institutions as the preservation of internal order and discipline, the maintenance of internal security against escape or unauthorized entry, and the rehabilitation of the prisoners. Id. at 412. "Second, the limitation of First Amendment freedoms must be no greater than is necessary to the protection of the particular governmental interest involved." Id. at 413. The Court then struck down a regulation that permitted prison officials to censor inmate mail and remove negative or defamatory statements because such broad restrictions were in no way necessary to the furtherance of a legitimate governmental interest.

In the same term the Court also decided Pell v. Procunier, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), where it again applied the Martinez standard in examining a different kind of restriction on inmate free speech. There the Court found that where considerations of institutional security required some limitations on visitors to inmates, a regulation prohibiting individual inmates from giving interviews to the press was justifiable where there were other means for prisoners to communicate with those outside and there were no restrictions on the content of such communication. 417 U.S. at 826.

This Court's decision in Bell v. Wolfish did not depart from the analysis of the preceding two cases. The Wolfish decision applied that analysis in upholding a very narrow rule which was shown to exist in response to a legitimate institutional interest of preserving internal security. There was no evidence in the record to indicate that the response was exaggerated in relation to the problem and therefore infringed protected First Amendment rights. There was record evidence to indicate that MCC inmates had alternative means of obtaining reading material that were not shown to be burdensome or insufficient. Each of these factors, as well as the short length of the deprivation for those prisoners, was vital to

the Court's holding that the rule in that case was a "reasonable 'time, place, and manner' regulation. . .necessary to further significant governmental interests . . . ." See 441 U.S. at 550-52. In a case in which each of these justifications no longer holds true, as they have been shown not to do in this case, the analysis developed for the prison context in Martinez and applied in Wolfish requires a finding that this publisher-only rule impermissibly restricts the First Amendment rights of prisoners. Because it failed to so find, the majority decision below is in error and should be reversed by this Court.

This case is worthy of consideration by this Court for reasons that extend far beyond the immediate question of whether petitioner will forever remain ignorant of the Yacqui way of knowledge. Evidence in this record establishes that books and other reading materials can be immensely valuable in promoting the rehabilitation of prisoners, a goal that is still felt to be important in the function of penal institutions. Unless this goal is to be abandoned entirely, the North Carolina publisher-only rule, and the many others like it throughout this country, should be struck down in order to remove a needless roadblock on the prisoner's road to recovery. Judge McMillan, in dissent below, quoted a saying repeated by his high school

English teacher: "Books are the windows through which the soul looks out." The Judge continued, "Rehabilitation, or correction, or retribution, may require imprisonment of the body; but is it also necessary, without demonstrated reason, to black out the windows of the soul?" Rich v. Luther, 514 F.Supp. at 486. Petitioner respectfully requests this Court to answer that question.

2. The special circumstances of this case warrant the exercise of this Court's discretionary powers.

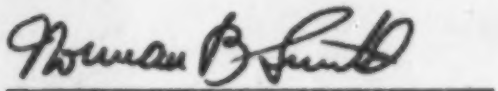
The petitioner herein is a prison inmate and is indigent; this litigation is sponsored by a non-profit organization. Undersigned counsel mistakenly assumed that a statutory writ of certiorari could be taken from a three-judge court within the usual 90-day period, and realized their error only after the 60-day period for filing notice of appeal had expired. Because of the confusion surrounding the appeal process from three-judge courts, which are now largely obsolete, petitioner prays the Court to excuse counsel's lapse and exercise its discretionary authority under 28 U.S.C. §1651(a) to grant this petition for a writ of certiorari in aid of its exclusive appellate jurisdiction. The question is an important one for this Court's consideration, for

the reasons stated above, and petitioner cannot obtain relief in any other court.

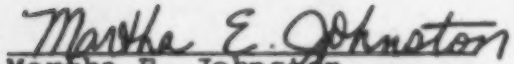
## CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion and order of the Three-Judge District Court.

Respectfully submitted,



Norman B. Smith
Smith, Patterson, Follin,
Curtis, James & Harkavy
704 Southeastern Building
Greensboro, N. C. 27401
Telephone: (919) 274-2992



Martha E. Johnston
Smith, Patterson, Follin,
Curtis, James & Harkavy
704 Southeastern Building
Greensboro, N. C. 27401
Telephone: (919) 274-2992

Prosecution of this action is sponsored by the North Carolina Civil Liberties Union Legal Foundation, Inc.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

| | |
|---|---|
| VERNON RICH on behalf of himself and all others similarly situated, Plaintiff, v. D. G. LUTHER, Superintendent of the Union County Unit of the North Carolina Division of Prisons; DAVID JONES, Secretary of the North Carolina Department of Correction; RALPH EDWARDS, Director of the Division of Prisons of the North Carolina Department of Correction, Defendants. | OPINION AND ORDER CIVIL ACTION NO. C-C-75-365 |

Vernon Rich, a prisoner confined in a North Carolina state prison, filed suit pursuant to 42 U.S.C. §1983, in December, 1975, on behalf of himself and other prisoners within that State's prison system seeking to have certain orders issued by the State of North

Carolina in accordance with state law, forbidding inmates from receiving books, magazines and newspapers not sent directly from the publisher, declared unconstitutional as being in violation of his First Amendment rights.[1] Since the action was commenced before the 1976 Amendment, the resolution of the constitutional issue presented required the convening of a three-judge court. 28 U.S.C. §2284.

The regulation challenged in this case is found in Title 5, N.C. Administrative Code, Chapter Subchapter 2D, [hereinafter, 5 N.C.A.C. 2D]. Specifically, plaintiff challenges 5 N.C.A.C. 2D.0101(a), which in relevant part reads:

> An inmate in medium, close, or maximum security may receive a reasonable number of books, newspapers, magazines, and other publications directly from the publisher. An inmate in minimum custody may receive publications from any source subject to the

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1/ This regulation shall hereinafter be referred to as the "publisher only rule."

> standard search for contraband. Inmates ordering publications must forward their payment for subscriptions or individual publications with their orders; inmates shall not receive publications of any kind on a trial basis with payment postponed. Additional publications may be donated to the unit or institution by community organizations or other interested persons in the community. The number of publications received by individual inmates, however, may be reasonably limited, to prevent overcrowding and possible fire hazards. All material submitted for delivery is subject to a search for contraband.

Plaintiff Vernon Rich was sent two books, GREAT SHORT WORKS ON MARK TWAIN and DON JUAN: A YAQUI WAY OF KNOWLEDGE, from a woman in Durham, North Carolina. The books were returned to her by prison officials. It is the refusal by the prison officials, in accordance with the publisher only rule, as set forth in

2D 0101(a), to allow Rich to have the two books that plaintiff presently challenges as having been a denial of his First Amendment rights under the Constitution of the United States.[2]

The sole issue before this court is the applicability of Bell v. Wolfish, 441 U.S. 520 (1979) to this case.[3] The Supreme Court in Wolfish considered a constitutional challenge to a publisher only rule in operation in a correctional institution in New York City.[4] The facility, in that case, was designed primarily to house pretrial detainees. The Supreme Court held that a publisher only rule does not violate the First Amendment rights of pretrial detainees. Id. at 550.

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2/ It must be noted that Rich does not claim that he required these two books in furtherance of preparation for litigation, thereby invoking support from other provisions of the Constitution. His claim is grounded solely on an assertion of a right to receive the two books.

3/ [Hereinafter "Wolfish"]. Wolfish was decided as this case was filed.

4/ The constitutional challenge to the publisher only rule in Wolfish was also under the First Amendment.

The essential distinguishing factor under consideration by this court is whether the holding in Wolfish with respect to the publisher only rule applies to persons convicted, sentenced and confined to a state prison as well as to prison detainees. We hold that it can and does.

Justice Rehnquist, writing for a plurality of the Court in Wolfish, observed that "maintaining institutional security and preserving order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of. . . [convicted prisoners]. . . ." Id. at 546.[5] He went on to say: "Prison administrators. . .should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Id. at 547.[6] We are convinced that the

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5/ See also, Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974).

6/ Jones, 433 U.S. at 128; Procunier v. Martinez, 416 U.S. 396, 404-405 (1973).

restrictions limiting receipt of books, magazines and newspapers from publishers only in a prison, which contain persons convicted of crimes, who do not possess the presumption of innocence that pretrial detainees do, is also a rational and reasonable response to security problems confronting state officials charged with the responsibility of managing the North Carolina prison system.

The Fourth Circuit recently considered a challenge to the publisher only rule in the Virginia prison system by one in a similar status to that of the plaintiff. Zacek v. Hutto, __ F.2d __ (1981). It was recognized in that case that the constitutional validity of a publisher only regulation as declared in Wolfish applied to persons convicted and sentenced to prison as well as to pretrial detainees.

Earlier a federal district court in Arkansas had reached a like conclusion in a challenge by a convicted prisoner to a publisher only regulation of the prison system. Cotton v. Lockhart, 476 F.Supp. 957 (D. Ark. 1979), aff'd., 620 F.2d 956 (8th Cir. 1980). The rule, in that case, pertained to books, magazines and newspapers. That court, however, limited its opinion to the procurement of books only. Id. at 958, n. 4. The court held that the rule did not violate the prisoner-plaintiff's

First Amendment rights, thereby sustaining the validity of the rule. The court said, "simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations." Id. at 960.

The district court in Cotton, as characterized later by the Eighth Circuit on review, determined that "(1) the rule operates in a neutral fashion regulating source rather than content of expression; (2) receipt of soft cover as well as hard cover books poses a substantial security problem. . .(4) inmates have access to reading materials through the prison library,. . ." 620 F.2d at 672. These findings are equally operative in the instant case and assisted the court in arriving at its conclusion.

In the instant case, prison officials, through their affidavits and depositions, demonstrated to the satisfaction of the court that the publisher only rule, as it exists in North Carolina, was promulgated to further a function of security within the state's prison system. Concern exists about the need to prevent the flow of drugs and weapons into prisons in North Carolina. The rule is, we believe, a rational response to a well recognized problem. It constitutes a valid state objective carried out in a not unconstitutionally restric-

tive manner. Therefore, we do not feel constrained in finding that the holding of the Supreme Court in Wolfish, with respect to the publisher only rule, is applicable to this case, where prison officials use the rule in dealing with persons convicted of crimes and sentenced to the North Carolina state prison system.

Accordingly the plaintiff is not entitled to the relief he seeks and the complaint is dismissed, and

IT IS SO ORDERED.

s/
Donald Russell
United States Circuit Judge

s/
Woodrow W. Jones
United States District Judge

McMillan, District Judge, dissenting:

I respectfully dissent.

The majority would take bad law (the "publishers only" decision in Bell v. Wolfish, 441 U.S. 520 (1979), cautiously announced by a badly divided court, and limited to a narrow situation), and would

extend it into new territory. They cite Zaczek v. Hutto, __ F.2d __ (4th Cir. 1981), which is not binding on this court, and which did not decide the question at all, but merely accepted the appellant's erroneous concession that the case was controlled by Wolfish. The majority do not in their opinion recognize the numerous ways in which this case differs in significant fact from Wolfish, and in which the result they reach far outdoes Wolfish in unjustified and apparently inadvertent repressiveness. I am unable to concur.

Bell v. Wolfish was tried on a skimpy record; this case was tried on a fully developed record, in which all the premises accepted by a slender majority of the Wolfish court were sharply repudiated by strong testimony. That fact makes a difference to me.

Wolfish and his fellow litigants were short-term prisoners; they were inmates at a New York City detention center which ordinarily housed only pre-trial detainees and persons awaiting sentencing; more than half of the inmates were kept there less than ten days, while sixty days was about the maximum duration for anyone. The Wolfish court said that

> ". . .we are also influenced in our decision by the fact that the rule's impact on

> pretrial detainees is limited to a maximum period of approximately sixty days." 441 U.S. at 552 (emphasis added).

Wolfish also relied on the short duration of stay in the New York institution to uphold its challenged "double bunking" practice (requiring an inmate to share toilet facilities and a small sleeping space with another person). By contrast, plaintiff in this case and the class he represents are all the persons serving active sentences in institutions of the North Carolina Department of Correction. Their sentences range from a few months to life imprisonment. Those facts make a difference to me.

The rule of Wolfish was limited to hardback books, and it allowed such books to be received from book stores and book clubs as well as from publishers. By contrast, the North Carolina rule under attack applies to all books and magazines, and makes no distinction between hard cover and soft cover publications. In the majority opinion in Wolfish, Justice Rehnquist carefully pointed out that when the case was before the Court of Appeals, which affirmed the District Court's injunction against enforcement of the rule, it applied to all books and magazines. 441 U.S. at 549. Before the case was argued in the Supreme Court, however, the rule was amended to permit

inmates to receive books and magazines from book stores as well as from publishers and book clubs and, at the time of the Supreme Court decision, there was an amendment under consideration which would allow soft cover materials to be received from any source. Those facts make a difference to me.

Wolfish and his fellows had additional means of obtaining reading materials. Among the sources specifically mentioned in the majority opinion of Rehnquist were: (1) Soft bound books and magazines could be received from any source, and hard back books could be received from book stores and book clubs as well as from publishers. North Carolina permits prisoners to receive no publications except from the publisher. (2) The New York prison offered for sale to inmates four daily newspapers and certain magazines, 42 U.S. 551, 552. No comparable availability of newspapers and magazines in North Carolina prisons is shown. (3) The single New York City facility involved in Wolfish had a prison library containing over eight thousand volumes! North Carolina offers no such wealth of access to information in its various prisons. Those facts make a difference to me.

Wolfish was pointedly restricted to its own facts, with caution against unwarranted extension to other fact situa-

tions. The Supreme Court's statement, at 441 U.S. 552, was that

> in sum, considering all the circumstances, we view the rule, as we now find it, to be a "reasonable 'time, place and manner' regulation that is necessary to further significant governmental interests . . . ." [Citations omitted, emphasis supplied].

The Supreme Court's warning limitation on its own decision makes a difference to me.

In Wolfish there was "simply no evidence in the record to indicate that MCC officials have exaggerated their response to this security problem and to the administrative difficulties posed by the necessity of carefully inspecting each book mailed from unidentified sources. Therefore, the considered judgment of these experts must control in the absence of prohibitions far more sweeping than those involved here." 441 U.S. at 551 (emphasis added). By contrast, the weight of the evidence before us shows that the "publishers only" rule cannot be justified by "security risks." And this panel is faced with a situation in which the prohibitions are indeed "far more sweeping."

The strong showing by the plaintiff's witnesses is that:

> (a) Abrogation of the rule would not increase security problems. In the absence of such a rule, the actual experience has been that security problems are minimal. In fact, North Carolina has no security problems in the minimum custody units, where the rule does not apply.
>
> (b) The main sources of contraband in prisons in descending order of frequency and importance are: (1) the institution itself with its kitchens, supply rooms, equipment and work and educational facilities; (2) a small number of corrupt, naive or opportunistic employees, delivery people or tradespeople who have access to the institutions; (3) inmates who are admitted or discharged or pass in and out as trustees, on work detail or on their way to and from court; (4) visitors; and (5) letter and package mail

that is inadequately inspected. The reading materials which the rule prohibits are thus only a portion of the fifth most frequent source of contraband.

(c) A diligent inspection of an average book or magazine should take less than thirty seconds. Weapons and escape devices can be easily detected. Other implements which may not be so easily detected are readily available in the prison environment.

(d) An avowed original purpose of the "publishers only" rule was to censor and control the content of prisoners' reading material and not to control the introduction of contraband.

(e) There is no evidence and no reason to believe that employees of publishers are any more honest than employees

of book stores, libraries and other distributors.

(f) Substantial quantities of drugs and money are already a problem in North Carolina prisons. These problems cannot be entirely eliminated without employing inhumane security measures.

Defendants' experts did not have any evidence of actual experience to the contrary. Defendants' claims are mainly assertions of economic and administrative inconvenience in searching for contraband in publications. Most of the supposed increased risk in security could be obviated by adequate inspection techniques. If the mass mailings they fear actually resulted from abolishing the rule, they could limit the number of mailings each prisoner could receive.

The great weight of the evidence in this case that the rule is not justified on "security" grounds makes a difference to me.

Wolfish reiterated the principle enunciated in Wolff v. McDonnell, 418 U.S. 539, 556, that there must be a

"mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." 441 at 546 (emphasis added). Wolfish does not support a conclusion that a broad "publishers only" rule in any prison setting should be upheld as constitutional. The First Amendment rights of North Carolina prisoners outweigh the minimal security risks which might result from partial or even total abrogation of the "publishers only" rule. The restriction against all publications from any source other than publishers is an over-reaction by prison officials to potential security problems. The rule cannot be sustained as a reasonable time, place and manner regulation that is necessary to further a significant governmental interest. Though the government and all we citizens have a significant interest in the security of the prison system, and though restrictions and regulations are essential to maintaining a secure prison, the rule the majority is upholding today is unreasonably broad in scope and unconstitutionally infringes the First Amendment rights of North Carolina prisoners.

I cannot help musing on the advertised purposes of imprisoning people who have been convicted of crimes. The literature abounds with articles dis-

cussing the goals of retribution versus punishment versus rehabilitation versus protection of society. The prison department is titled the North Carolina "Department of Correction." If "correction" includes rehabilitating persons to live non-violent and non-criminal lives, then the "publishers only" rule runs totally counter to that goal.

One of the numerous epigrams which Pansy Howell (mother of Ida Friday, wife of Bill Friday, President of the University of North Carolina) taught my tenth grade English class at Lumberton High School in 1930 was that "Books are the windows through which the soul looks out." Rehabilitation, or correction, or retribution, may require imprisonment of the body; but is it also necessary, without demonstrated reason, to black out the windows of the soul? Prisoners as a group are impoverished; they can't afford to pay publishers' prices like $12.95 or $29.50 for new books from publishers when cheaper sources are available. The two books which were mailed to the plaintiff and were returned to the sender by prison officials were Great Short Works of Mark Twain and The Teachings of Don Juan: A Yacqui Way of Knowledge. The meager listing of books available through the prison system library does not include these titles nor the titles

of many books through which prisoners, with nothing but time on their hands, can become motivated to complete their education or to learn a skill, or through which they can be provided with positive, non-debilitating prison experiences.

Breaking the cycles of poverty, ignorance, criminal behavior and recidivism is hard enough if it is done in an enlightened way. Protecting prisoners' First Amendment rights is mandatory if we are going to approach the task humanely and with any hope of success.

I respectfully, but emphatically, dissent.

This 15th day of May, 1981.

s/ James B. McMillan

United States District Judge

# Opposition

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No. 81 - 296

IN THE

# Supreme Court of the United States

OCTOBER TERM 1981

VERNON RICH,
*Petitioner*

v.

D.G. LUTHER, *et al.*,
*Respondents*

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

RUFUS L. EDMISTEN
Attorney General of
North Carolina

*By:*
Ben G. Irons, II
Assistant Attorney General
Counsel for Respondents
Justice Building
Post Office Box 629
Raleigh, North Carolina 27602

Telephone: (919) 733-7188

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## QUESTIONS PRESENTED

I. DOES THE COURT HAVE JURISDICTION TO CONSIDER A PETITION FOR CERTIORARI TO A THREE—JUDGE COURT FILED THIRTY DAYS AFTER THE STATUTORY TIME PERIOD FOR TAKING AN APPEAL HAS EXPIRED?

II. DOES THIS COURT'S DECISION IN BELL V. WOLFISH, 441 U.S. 520 (1979) ELIMINATE THE NEED FOR REVIEW OF THE DECISION OF THE COURT BELOW? DID THE RECORD IN THE COURT BELOW ESTABLISH THAT THE PUBLISHER'S ONLY RULE IS A RATIONAL RESPONSE TO A LEGITIMATE SECURITY PROBLEM?

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No. 81-296

IN THE

# Supreme Court of the United States

OCTOBER TERM 1981

VERNON RICH,
*Petitioner*

v.

D.G. LUTHER, *et al.*,
*Respondents*

**ON PETITION FOR WRIT OF CERTIORARI TO THE THREE-JUDGE DISTRICT FOR THE WESTERN DISTRICT OF NORTH CAROLINA**

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### OPINION BELOW

The decision of the Three-Judge Court for the Western District of North Carolina is reported at 514 F.Supp. 481 (W.D.N.C. 1981).

### JURISDICTION

The opinion and order of the Three-Judge Court was filed on May 15, 1981. This Petition for Certiorari was filed in this Court on August 13, 1981. The Petitioner did not appeal from the order of the Three-Judge Court within sixty days as required by law. 28 U.S.C. §2101(b). The Petitioner acknowledges his failure and concedes that "appellate jurisdiction is foreclosed." Nevertheless, he seeks to invoke jurisdiction pursuant to 28 U.S.C. §1651(a), the All Writs Act. This provision authorizes the Court to issue Writs "in aid of

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jurisdiction" but it cannot enlarge the jurisdiction of the Court. Because the time for taking an appeal expired without any action by Petitioner, the Court has no jurisdiction to consider this Petition. Authorities supporting this position are set out in the first argument below.

## CONSTITUTIONAL PROVISIONS

This case involves the First and Fourteenth Amendments to the Constitution of the United States.

## STATEMENT OF THE CASE

This action was brought by a class of prisoners pursuant to 42 U.S.C. §1983. The prisoners sought injunctive relief in the form of an Order declaring the North Carolina Department of Correction's "Publisher Only Rule" a violation of the First Amendment. Specifically, the prisoners challenged 5 NCAC 2D.0101 (a) which reads as follows:

> An inmate in medium, close or maximum security may receive a reasonable number of books, newspapers, magazines and other publications directly from the publisher. An inmate in minimum custody may receive publications from any source subject to the standard search for contraband. Inmates ordering publications must forward their payment for subscriptions for individual publications with their order; inmates shall not receive publications of any kind on a trial basis with payment postponed. Additional publications may be donated to the Unit or Institution by community organizations or other interested persons in the community. The number of publications received by individual inmates however, may be reasonably limited to prevent overcrowding and possible fire hazards. All material submitted for delivery is subject to a search for contraband.

Because the action was commenced prior to the 1976

Amendments, the resolution of the issue required the convening of a Three-Judge Court. 28 U.S.C. §2284. The parties stipulated that all factual evidence would be submitted in the form of affidavits and depositions prior to the hearing. Depositions and affidavits were offered by both sides. The case was briefed and came on for argument before the Three-Judge Court on September 29, 1980. On May 15, 1981 the Court issued an Order dismissing the Complaint.

## REASONS FOR DENYING THE WRIT

The Respondents urge the Court to deny the Petition for the following reasons:

(1) The Court has no jurisdiction to consider the Petition because it was filed after the statutory period for taking an appeal had expired.

(2) The decision of the Court below follows this Court's decision in *Bell v. Wolfish,* 441 U.S. 520 (1979). The record in the Court below establishes that the Publisher's Only Rule is a rational response to a legitimate security problem.

1. The Court has no jurisdiction to consider the Petition.

The exclusive method of obtaining review of the decision of a Three-Judge Court is by direct appeal. 28 U.S.C. §1253. Petitioner did not take an appeal within sixty days following the Court's order as required by law. 28 U.S.C. §2101 (b)[1]. Statutes imposing time limitations serve one obvious purpose.

---

[1]28 U.S.C. § 2101 (c) allows the Court to consider "any Writ of Certiorari" filed within ninety days following the judgment. 21 U.S.C. 2101 (c) however, applies only to cases not covered by Sections (a) and (b). 12 *Moore's Federal Practice* § 607.04 [1]-[3] at 9-22, 9-23 (1980). The term "any Writ of Certiorari" is used because there are several statutes which allow Certiorari from the decision of various courts. See 28 U.S.C.§ 1254 (Court of Apeals); 28 U.S.C. § 1255 (Court of Claims); 28 U.S.C. § 1256 (Court of Customs and Patent Appeals); 28 U.S.C. § 1257 (State Courts) and 28 US.C. § 1258 (Supreme Court of Puerto Rico).

> The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within the time the proscribed application has been made; and if it has not, to advise prospective apellees that they are freed of the appellant's demands. Any other construction of this statute would defeat its purpose. *Matten Steamboat Company v. Murphy*, 319 U.S. 412, 415 (1942).

In order to fulfill the legislative purpose this Court has deemed the time limits set out in the statutes "mandatory and *jurisdictional.*" *Browder v. Illinois Department of Correction*, 434 U.S. 255, 264 (1978) and cases cited therein (emphasis supplied). Under Rule 11.4 of the Rules of the Supreme Court, the time for taking an appeal cannot be extended. For these reasons, this Court has no jurisdiction to grant the Petition.

The Petitioner concedes in his brief that "appellate jurisdiction of this Court is foreclosed..." (See Petition p. 4). Nevertheless, he urges the court to grant a Common Law Writ of Certiorari pursuant to the All Writs Act, 28 U.S.C. § 1651 (a). That provision, however, allows the Court to grant extraordinary writs only "in aid of...jurisdiction."[2] It cannot enlarge the Court's jurisdiction to allow it to hear cases in which no appeal has been taken within the time required by law. The purpose of 28 U.S.C. §1651 is to effectuate established jurisdiction. A writ may be issued only when jurisdiction is exercised, then existing, or prospective. See 8 *Moore's Federal Practice* §110.27 at 290, 294 (1980). Because this Court has no jurisdiction to consider a belated appeal, it obviously cannot grant a Writ of Certiorari "in aid of jurisdiction."

---

[2]See also Rule 26 of the Rules of the Supreme Court which reads in pertinent part:

> To justify the granting of any Writ under 28 U.S.C § 1651 (a) it must be shown that the Writ will be in aid of the Court's approved jurisdiction...

(2) The decision of the Court below follows the Court's decision in *Bell v. Wolfish*. The record in the Court below established that North Carolina's Publisher's Only Rule is a rational response to a legitimate security problem.

In *Wolfish v. Bell*, 573 F.2d 118 (2nd Cir. 1978), the Second Circuit concluded that prison officials should be able to solve all their security problems "merely by inspecting books and magazines." *Id.* at 130. It also found that although the prison had a library, it was "inconceivable that the First Amendment rights of an incarcerated individual [did] not extend beyond a few selected titles" available there. *Id.* Finally, the Court noted "no record of untoward experiences with far less restrictive rules." *Id.* For these reasons, the Second Circuit found that the Publisher Only Rule in effect at a federal prison violated the First Amendment.

This Court forcefully refused to adopt the lower Court's reasoning when it decided *Bell v. Wolfish*, 441 U.S. 520 (1979). The language of n.32 is most emphatic.

> The District Court stated "with no record of untoward experience with places like the MCC, and with no history of resort to less restrictive measures, Defendants' invocation of security measures cannot prevail with respect to the high constitutional interest here at stake." 428 F. Supp. at 346. We rejected this line of reasoning in *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. at 132-133 where we stated, "responsible prison officials must be permitted to take reasonable steps to forestall...threat [s to security], and they must be permitted to act before the time when they can compile a dossier on the eve of a riot." We reject it again now. In *Jones* we also emphasized that "the informed descretion of prison officials that there is a *potential* danger" may be sufficient for limiting rights even though this showing might be "unimpressive if submitted as justification for governmental restriction of personal communication among members of the general

> public." (Emphasis in text). *Id.* at 133 n. 9 quoting *Pell v. Procunier,* supra 417 U.S. at 825; see *Procunier v. Martinez,* 416 U.S. at 414.

The dissenting opinion below dismisses the teachings of *Bell v. Wolfish* as "bad law." *Wolfish,* however, was not an aberration, but a restatement of principles firmly established by this Court in *Jones v. North Carolina Prisoners' Labor Union,* 433 U.S. 119 (1977), *Pell v. Procunier,* 417 U.S. 817 (1974) and *Procunier v. Martinez,* 416 U.S. 408 (1974). The cases following *Wolfish* uniformly conclude that most issues involving the Publisher's Only Rule are resolved by *Wolfish.* See *Cotton v. Lockhart,* 476 F.Supp. 956 aff'd 620 F.2d 658 (8th Cir. 1980); *Zaczek v. Hutto,* 642 F.2d 74,75 (4th Cir. 1980). The Petitioner has cited no case that has struck down a Publisher's Only Rule in any form since *Wolfish.* There is no conflict in the Circuits and the issue appears settled.

Petitioner attempts to raise the question litigated in *Bell v. Wolfish* in this case. He contends that prison officials could have solved their problems by manually inspecting books; that their fears of increased contraband are based on what "could happen" and not documented by specific smuggling incidences; that books are only a "minor" source of contraband in prisons; and that the list of titles available to medium custody prisoners in prison libraries "offers little in mitigation" of the Publisher Only Rule. If these contentions have a familiar ring, it is because the Court considered them only two years ago and forcefully rejected them . They should be rejcted again now.

This response would be incomplete without a reply to the interpretation of the record below made in the Petition and in the dissenting opinion. From reading just these assessments, the Court would be led to conclude that the Respondents offered little or no evidence to support the rule in the Court below. Actually, the evidence regarding security concerns weighed heavily in favor of prison officials.

Prison officials offered the depostion of Herman G. Moeller, who was employed by the Federal Bureau of Prisons for 32 years and retired as a Deputy Director, and Henry J.

Cox, Special Intelligence Supervisor at the Federal Prison in Atlanta. Moeller testified that the rule was a necessary restriction for the following reasons:

(1) Contraband items can be concealed in the spine of a book so that they cannot be detected without tearing a book apart.

(2) Droplets of synthetic drugs like LSD can be dropped on the pages of books so that they cannot be detected without inspection of each page.

(3) Abrogation of the Publisher Only Rule could result in mass mailing of publications to inmates. Inspection of every page of every newspaper and book would be impossible. Inmates would then have a foolproof method of smuggling contraband and the flow of contraband drugs and money would increase. The funds would be used to bribe corrupt personnel and yet another method of smuggling would be available.

(4) The increased flow of contraband forms a foundation for inmate "gangs." Inmates who use drugs develop a pathological need. If an inmate or group of inmates discover a method of controlling drug traffic, they can demand large amounts of money for their product. When the users and addicts are unable to pay, they will be threatened, assaulted, homosexually raped or murdered. Inmates subjected to the pressures of these inmate gangs have been known to escape or commit suicide.

(5) Furnishing each of the Units of the North Carolina Department of Correction with metal detectors would not significantly decrease the traffic of contraband to the state's prisoners. Some instruments used in escape are made of plastic. More important, nothing other than tedious manual inspection detects controlled substances.

For these reasons, Moeller concludes that the invalidation of this necessary security measure "would greatly increase the vulnerability of the Institution."

Cox testified that books may be hollowed out so that contraband can be concealed within them. Contraband

drugs such as heroin can be taped to the pages of newspapers so that they cannot be detected without unfolding the papers papers or turning each page. At the Federal Prison in Atlanta, "black beauties" and marijuana have been found in "cutout" sections of newspapers. Droplets of LSD and other synthetic drugs dropped on letters and absorbed in the papers sometimes can be detected. A dark spot appears where the LSD is dropped. If the "Publisher Only" rule is invalidated, every page of every book would have to be examined. It would be absolutely impossible to maintain control over the flow of LSD and other synthetic drugs to prisons.

Cox also indicated that outside contacts who wish to pass contraband to prison inmates are likely to use the postal service as a carrier. Letters can usually be inspected, but as indicated, publications cannot. Smuggling publications is cheap and involves very little risk. It is more difficult and more expensive to attempt to bribe a correctional officer. At the Federal Prison in Atlanta employees are illegally paid as much as $750.00 for passing contraband items to inmates. Prisoners, as well as employees, risk criminal prosecution when the contact is made. Attempts to pass contraband during visitation pose similar risks. On the other hand, publications containing contraband can be sent directly to inmates for ordinary mailing costs. Also, when contraband is sent in a publication, the sender can simply withhold his name and avoid the risk of criminal prosecution.

Thus it was Cox' opinion that the invalidation of the Publisher Only Rule would encourage the associates of inmates to use publications to smuggle contraband. Drug flow would increase and more inmates would become addicted or indebted. The families of these inmates would feel compelled to help them. Those most likely to be involved in smuggling would be provided with a vehicle for smuggling as a result of abrogation of the rule.

W.A. Mahoney and D.G. Luther, Unit Superintendents in the North Carolina Department of Correction, testified in affidavits that use of publications to smuggle contraband

poses a significant problem in North Carolina. Mahoney cited a specific instance in which contraband had been found during search of a publication. This evidence, taken as a whole, provided more than sufficient support for the maintenance of the Publisher Only Rule in North Carolina.

Petitioner countered Respondents' evidence in the Court below with the depostion of Robert Sarver and the affidavit on Hans Mattick. At the time that his deposition was taken, Sarver was a Professor at the University of Arkansas. He had served as Commissioner of Correction in West Virginia from 1966 to 1968. Form 1968 to 1971 he apparently served as Commissioner of Correction in Arkansas and as Superintendent of the facility at Cummins, Arkansas. These were the only administrative positions that Sarver had held. He had a total of five years administrative experience.

Petitioners' contend that Sarver's testimony should be given great weight because he had no security problems at Cummins despite the fact that there was no Publisher Only Rule in effect there. There was an obvious reason for the lack of problems. At Cummins, security was so lax that it was not necessary to use publications to pass contraband. The guards at Cummins were inmate "trustees" that could easily be bribed. Many minimum custody prisoners were allowed to move into the community during the day and return to the prison at night.[3] Sarver had no experience in any institution where the Publisher Only Rule could possibly be effective.

Sarver also indicated in his disposition that contraband could be controlled without unfolding and inspecting every page of every newspaper received by inmates. He expressed the opinion that newspapers should be unfolded and inspected only where the addresses are known racketeers. This testimony showed his naivete. If all "racketeers" were known, there would be no drug problem in prisons. Known

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[3]See Sarver's deposition pp 60-65. The deplorable conditions and total lack of security at Cummins are well documented in the Courts' opinions in *Finney v. Hutto*, 410 F.Supp. 251 (E.D. Ark. 1976) aff'd 554 F.2d 740 (8th Cir. 1977). These opinions were recently affirmed by this Court. See *Hutto v. Finney*, 437 U.S. 678 (1978).

racketeers use unknown racketeers to distribute their products. Sarver would have provided these unknowns with a foolproof method of smuggling.[4]

Petitioner also offered the affidavit of Hans Mattick, a Professor of Criminal Justice at the University of Illinois, Mattick served three years as an Assistant at the Cooke County Jail from 1955 to 1958. This is the only administrative position that he has ever held. The period from 1955 to 1958 was before the influx of contraband drugs became a problem in prisons.[5] Contraband drugs are now one of the principle problems. Mattick has never confronted a serious drug problem. Neither he nor Sarver will ever have to deal with these problems in the future. The classroom provides a protected platform from which these two can second guess prison official's efforts to maintain security without fear of the consequences of a breakdown.

Thus on the one hand, the record below showed that two federal prison administrators with a total of 57 years of experience believed that the Publisher Only Rule is necessary for the maintenance of security. North Carolina prison officials offered affidavits supporting these experts' conclusions. On the other hand, two academicians with a total of five years administrative experience in prisons did not believe that the rule is necessary. For the reason that we have discussed, the Court below properly deferred to the prison officials' judgment. *Bell v. Wolfish*,supra; *Jones v. North Carolina Prisoners' Labor Union*, supra; *Pell v. Procunier*, supra.

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[4]Sarver's conclusions bring to mind peititioner's assertion that books are "a minor" source of contraband. Quite obviously, it is difficult to quantify the amount of contraband that comes in from each vehicle. There was testimony below that established the common sense notion that some contraband does come in through books. Prison officials do know that they can limit the effectiveness of books as a vehicle for smuggling contraband by enforcing a Publisher's Only Rule.

[5]See Cox deposition p. 18

## CONCLUSION

The Court clearly does not have jurisdiction to consider this Petition. Even if the jurisdictional problem could be avoided, the court adequately addressed the issues presented here in *Bell v. Wolfish* and there is no need to reconsider them. The Respondent urges the Court to deny the Petition with all costs taxed to the Petitioner.

This the 13th day of November, 1981

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

Ben G. Irons, II
Assistant Attorney General
ATTORNEY FOR RESPONDENTS
N.C. Dept. of Justice
P.O. Box 629
Raleigh, N.C. 27602

Telephone: (919) 733-7188

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he has this day served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon the person indicated below by depositing a copy of same in the United States mail, first class postage prepaid, addressed to the following:

Norman B. Smith, Esq.
704 Sourtheastern Building
Greensboro, North Carolina 27401
Attorney for Petitioner

This the 13th day of November, 1981

RUFUS L. EDMISTEN
Attorney General

Ben G. Irons, II
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-7188